

Cite as Det. No. 15-0324, 35 WTD 348 (2016)

BEFORE THE APPEALS DIVISION
 DEPARTMENT OF REVENUE
 STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 15-0324
)	
...)	Registration No. . . .
)	

[1] RCW 82.04.290(2); RCW 82.04.4286: SERVICE B&O TAX – FEDERAL PREEMPTION - FEDERAL EMPLOYEE HEALTH BENEFITS (FEHB)– 5 USC § 8909(f) – HEALTH CARE RECEIPTS FROM FEHBA INSURANCE CARRIERS. Service B&O tax imposed on a health care provider’s receipts from insurance carriers who participate in the FEHB program is not a direct or an indirect tax imposed on an FEHBA carrier with respect to payments made from FEHB funds and, therefore, is not preempted by 5 USC §8909(f).

[2] RCW 82.04.290(2); RCW 82.04.4286: SERVICE B&O TAX - FEDERAL PREEMPTION - 42 CFR § 422.404 - HEALTH CARE PROVIDER’S RECEIPTS FROM MEDICARE ADVANTAGE (MA) PLANS. Service B&O tax imposed on a health care provider’s receipts from insurance carriers who participate in the MA program is not a direct or an indirect tax imposed on an MA carrier with respect to payments made from MA funds and, therefore, is not preempted by 42 CFR § 422.404.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Gabriella Herkert, A.L.J. – Health care provider appeals the denial of its request for refund of service and other activities business and occupation (B&O) tax paid on receipts from insurance carriers that participate in the Federal Employee Health Benefits (FEHB) and Medicare Advantage (MA) programs, asserting the tax is preempted by federal law. . . . The taxpayer’s petition is denied.¹

ISSUES

1. Is the imposition of B&O tax on a health care provider’s receipts from insurance carriers who participate in the Federal Employee Health Benefits (FEHB) program preempted by 5 USC § 8909(f)?

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

2. Is the imposition of B&O tax on a health care provider's receipts from insurance carriers who participate in the Medicare Advantage (MA) program preempted by 42 CFR § 422.404?

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FINDINGS OF FACT

Taxpayer, a private corporation headquartered in . . . , Washington, provides health care services to surgical patients at its Washington facilities. Some of the taxpayer's patients are enrolled in health insurance plans funded by the FEHB and the MA federal health insurance programs. The health insurance plans are offered to the patients by third-party insurance carriers that participate in the federal programs. The taxpayer bills the patients' insurance carriers for the health services provided to the patients.

The taxpayer submitted to the Department of Revenue (Department) a request for refund of service and other activities B&O tax it paid, for the period December 1, 2008 through December 31, 2009, on receipts from insurance carriers that participate in the federal programs, asserting that Washington's taxation of these receipts is preempted by the federal statutes and regulations governing the federal programs. The Department denied the taxpayer's request because the taxpayer is not a carrier or underwriter of the federal programs. The taxpayer timely appealed the denial of its request for refund.

ANALYSIS

RCW 82.04.220 imposes the B&O tax "for the act or privilege of engaging in business activities." Taxpayers who are engaged in service businesses or businesses that are not specifically taxed under another B&O tax classification are generally required to pay B&O tax under RCW 82.04.290(2) measured by the "gross income of the business." A B&O tax deduction is allowed for amounts derived from business activities that the state is prohibited from taxing under the Constitution or laws of the United States. RCW 82.04.4286.

Pursuant to the Supremacy Clause, U.S. CONST., ART. VI., cl.2, federal law can preempt state law through: (1) express preemption; (2) field preemption (sometimes referred to as complete preemption); and (3) conflict preemption. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491, 107 S.Ct. 805 (1987). Express preemption exists where Congress enacts an explicit statutory command that state law be displaced. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382, 112 S.Ct. 2031 (1992). Absent explicit preemptive text, preemption may be inferred based on field or conflict preemption, both of which require us to imply Congress' intent from the statute's structure and purpose. *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403 (1990).

When considering preemption, no matter which type, "[t]he purpose of Congress is the ultimate touchstone." *Cipollene v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608 (1992); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671 (1995). In order to avoid an unintended encroachment on state authority, the Supreme Court has made clear that when interpreting a federal statute, courts should be reluctant to find preemption. *CSX Transportation v. Easterwood*, 507 U.S. 658, 662-64, 113 S.Ct. 1671

(1995); *Travelers*, 514 U.S. at 654. Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890 (1983). “If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.” *CSX*, 507 U.S. at 664.

When interpreting a statute, it must be presumed “that a legislature says in a statute what it means and means in a statute what it says.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 252, 112 S.Ct. 1146 (1992). The preemption provisions for the three federal programs are each reviewed below.

1. Federal Employees Health Benefits (FEHB) Program

The Federal Employees Health Benefits Act of 1959 (FEHBA), 5 USC § 8901 et seq., establishes a comprehensive program of health insurance for federal employees. The FEHBA authorizes the Office of Personnel Management (OPM) to contract with private carriers to offer federal employees an array of health care plans. 5 USC § 8902(a). To purchase insurance under a FEHBA plan, enrollees make payments, matched by contributions from the federal government, into a specifically designated account in the United State Treasury, entitled the Federal Employees Health Benefits Fund (FEHB Fund). 5 USC §§ 8906, 8909. Carriers draw against the FEHB Fund to pay for covered health care benefits. *Id.*; see also 48 CFR § 1632.170(b).

The FEHBA contains the following preemption provision forbidding states from taxing health insurance carriers with respect to payments made to them from the FEHB Fund:

No tax, fee, or other monetary payment may be imposed, directly or indirectly, on a carrier or an underwriting or plan administration subcontractor of an approved health benefits plan by any State, . . . with respect to any payment made from the Fund.

5 USC § 8909(f)(1) (emphasis added).

The FEHBA defines a “carrier” as:

[A] voluntary association, corporation, partnership, or other nongovernmental organization which is lawfully engaged in providing, paying for, or reimbursing the cost of, health services under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, or similar group arrangements, in consideration of premiums or other periodic charges payable to the carrier, including a health benefits plan duly sponsored or underwritten by an employee organization and an association of organizations or other entities described in this paragraph sponsoring a health benefits plan.

5 USC § 8901(7).

The FEHBA preemption provision was reviewed in relation to Seattle's B&O tax in *Group Health Cooperative v. City Seattle*, 146 Wn. App. 80, 189 P.3d 216 (2008), where the court set forth the established requirements to invoke the preemption:

“Under 5 USC § 8909(f)(1), state regulation is preempted if it is (1) a state or local tax, fee, or other monetary payment; (2) imposed directly or indirectly on a carrier; and (3) with respect to payments made from the [FEHB Fund].” *Health Maint. Org. of N.N., Inc. v. Whitman*, 72 F.3d 1123, 1128 (3rd Cir. 1995).

Group Health, 146 Wn. App. at 94 (bracketed term ours).

Group Health Cooperative, a health maintenance organization (HMO), received premium payments from its patient members in exchange for health services, and received premium payments made by the federal government from the FEHB Fund for those patients that are covered by the FEHB program. *Id.* at 83-84. The court held that Group Health Cooperative was a carrier, as defined by the FEHBA, that contracts with the federal government to provide health care coverage in exchange for payments from the FEHB Fund; therefore, 5 USC § 8909(f)(1) preempts the city's imposition of its B&O tax on the HMO's receipts from the FEHB Fund. *Group Health*, 146 Wn. App. at 95-96.

The factual circumstances in the present appeals are entirely different from those in *Group Health Cooperative v. City Seattle*, 146 Wn. App. 80, 189 P.3d 216 (2008). Taxpayer does not provide services based on group affiliation and has no members. Taxpayer is not an FEHBA carrier that receives payments from the FEHB Fund; therefore, the FEHBA preemption provision does not apply to it. The taxpayer's assertion on appeal is based on an economic pass-through theory. The taxpayer asserts that the imposition of Washington's B&O tax on its gross receipts from FEHBA insurance carriers is a tax imposed indirectly on the FEHBA carrier's receipts from the FEHB Fund. Arguments based on similar economic pass-through theories were made by the federal government in *United States v. West Virginia*, 339 F.3d 212 (4th Cir. 1995), and more recently by a medical products retailer in *Mobility Medical, Inc. v. Mississippi Dep't of Revenue*, 119 S. 3d 1002 (2013), *cert. denied*, 134 S.Ct. 1541 (2014), 188 L. Ed. 2d 557. The courts in both cases held that taxing the gross income of a business that receives payments from a FEHBA carrier was not an indirect imposition of a tax on a FEHBA carrier with respect to payments from the FEHB Fund. *West Virginia*, 339 F.3d at 218-219; *Mobility Medical*, 119 S. 2d 1002 (2013), *cert. denied*, 134 S. Ct. 154 (2014), 188 L. Ed. 2d 557.

In *West Virginia*, the Fourth Circuit held that even though health care providers could pass the economic costs of a gross receipts tax to an insurance carrier, that potential choice by the providers did not constitute a prohibited imposition of an indirect tax on the insurance carrier. *West Virginia*, 339 F.3d at 218-219. The court stated that the legal [incidence] of the state gross receipts tax fell on the providers alone and a possible economic pass-through of costs to FEHBA carriers does not equate to the indirect imposition of a tax. *Id.* In further support of its holding, the court relied on the Supreme Court's rejection of economic pass-through theories in determining what constitutes indirect taxation in the analogous constitutional field of preemption of state taxation of the federal government. *Id.* at 216 (citing *United States v. Fresno*, 429 U.S. 452, 459, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977) (state's tax of federal employees' housing benefit,

though passing an economic burden through to the federal government by lowering the effective pay rate of its employees, was not a prohibited tax on the federal government because the tax equally applied to other similarly situated constituents of the state)). The *West Virginia* court determined that the rule espoused by the Fresno Court should also apply to the FEHBA preemption provision because of the similarities between the prohibitions:

Fresno's holding therefore results in the rule that an economic pass-through of a generally applicable tax does not constitute a tax, direct or indirect, of the recipient of the pass-through. . . .

Fresno's rule applies here by analogy because of the many similarities between section 8909(f)'s preemption and the Constitution's preemption of state taxation of the federal government. Section 8909(f) precludes states from taxing the carriers directly or indirectly. The Constitution precludes states from taxing the federal government directly or indirectly. Both ensure that state tax laws do not thwart the will of the federal government. Both face the economic reality that the states' tax regimes would be seriously hampered were all state taxes of non-protected taxpayers that create pass-through economic burdens on protected taxpayers treated as indirect taxes of those protected taxpayers.

West Virginia, 339 F.3d at 216-217.

The Mississippi Supreme Court also refused to equate a potential economic pass-through of costs to an indirect tax on FEHBA carriers in *Mobility Medical, Inc. v. Mississippi Dep't of Revenue*, 119 S. 2d 1002 (2013), *cert. denied*, 134 S. Ct. 154 (2014), 188 L. Ed. 2d 557. *Mobility Medical*, a medical products retailer, asserted that the FEHBA preempted Mississippi's gross receipts tax on its revenues from FEHBA carriers because any state tax that might result in an increase in costs for the FEHB Fund is an indirect tax. *Mobility Medical*, 119 S. 2d 1002 (2013), *cert. denied*, 134 S. Ct. 154 (2014), 188 L. Ed. 2d 557. The court held that nothing in the Mississippi tax law requires the retailer to pass on the tax (or any of its costs) to its customers, or that the retailer be reimbursed its costs by the FEHB Fund; therefore, there is no preemption because there is no indirect tax on the carrier, or conflict between the state and federal laws. *Id.* The court noted that if an economic cost "trickle-down effect" amounted to an indirect tax, then preemption would equally apply to all state and local taxes born by the retailer, including inventory tax, unemployment tax, property taxes, franchise tax, license fees, and the numerous taxes or fees that a retailer might "indirectly" pass along to its customers, and that there was no evidence of such expansive Congressional intent in the FEHBA. *Id.* at .

5 USC § 8909(f)(1) limits preemption to taxes "imposed, directly or indirectly, **on a carrier**" (Emphasis added) and this limitation is clearly expressed in the plain language of that preemption provision. We need look no further than the plain language of the preemption provision in discerning Congress's intent. See *CSX*, 507 U.S. at 664. The Department, using similar analysis, has determined that payments to health care providers are not indirect taxation of the carriers. See Det. No. 13-240, 33 WTD 354 (2014). The taxpayer's case is indistinguishable. Taxpayer has not established that Washington's imposition of B&O tax on its

gross revenues as health service providers is a direct or indirect tax imposed on a FEHBA carrier and preempted by 5 USC § 8909(f)(1).

2. Medicare Advantage (MA) Program

A Medicare Advantage (MA) Plan is a type of Medicare health plan offered by a private company that contracts with the Centers for Medicare & Medicaid Services (CMS) to provide Medicare benefits. See 42 CFR § 422.2. The taxpayer asserts that Washington's B&O tax on its gross revenues from carriers who receive payments from the Medicare program is preempted by 42 CFR § 422.404, which provides:

§ 422.404 State premium taxes prohibited.

(a) Basic rule. No premium tax, fee, or other similar assessment may be imposed by any State, . . . with respect to any payment CMS makes on behalf of MA enrollees under subpart G of this part, or with respect to any payment made to MA plans by beneficiaries, or payment to MA plans by a third party on a beneficiary's behalf.

(b) Construction. Nothing in this section shall be construed to exempt any MA organization from taxes, fees, or other monetary assessments related to the net income or profit that accrues to, or is realized by, the organization from business conducted under this part, if that tax, fee, or payment is applicable to a broad range of business activity.

(Emphasis added.) The terms "MA organization" and "MA plan" are defined in 42 CFR 422.2 as follows:

MA organization means a public or private entity organized and licensed by a State as a risk-bearing entity (with the exception of provider-sponsored organizations receiving waivers) that is certified by CMS as meeting the MA contract requirements.

MA plan means health benefits coverage offered under a policy or contract by an MA organization that includes a specific set of health benefits offered at a uniform premium and uniform level cost-sharing to all Medicare beneficiaries residing in the service area of the MA plan

Similar to the FEHBA preemption provision, 42 CFR 422.404 is limited to taxing payments made by CMS from the federal fund. The taxpayers are not MA plans or MA organizations and do not receive any payments from CMS or the Medicare fund. The taxpayers receive payments from MA plans for health services provided to their patients who are MA enrollees. Washington's B&O tax on the taxpayer's gross receipts from health services is not a tax or other assessment imposed "with respect to any payment CMS makes on behalf of MA enrollees . . . or any payment made to MA plans. . ." and is not prohibited by 42 CFR 422.404(a). The taxpayer's economic pass-through argument that its tax costs may be passed along to MA plans does not amount to a prohibited tax or assessment under the same analysis of *Fresno*, *West Virginia*, and *Medical Mobility* discussed above in regards to preemption under the FEHBA. See 33 WTD 354 (2014).

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DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 23rd day of November, 2015.